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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 78-1521

ALAN B. EPSTEIN, SANFORD I. JABLON, RICHARD A. WEISBORD, AND ARNOLD J. WOLF, *Appellants*

v.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF, A Partnership, *Appellee*

APPELLANTS' REPLY TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

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APPELLANTS' REPLY TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

INTRODUCTION

In response to Appellants' Jurisdictional Statement on the appeal taken from the Supreme Court of Pennsylvania in the instant action, Appellee has filed a Motion with this Honorable Court to dismiss the appeal or affirm the judgment of the Supreme Court of Pennsylvania. It should be noted by this Court that Appellee's Motion is untimely in that it was not filed within the required period as provided by Rule 16 of the Rules of the Supreme Court of the United States. Accordingly, Appellee's Motion should not be considered by this Court. However, in the event that this Court does accept Appellee's Motion for consideration, Appellants submit that it is without merit and should be denied for the reasons set forth below.

ARGUMENT

I. Appellee's Motion to Dismiss or Affirm Materially Misstates the Record.

A. Appellee's Motion states: "Moreover, appellants were not and could not have been disciplined in or based on these proceedings." (p. 6)[1] This statement is not true. Following the decision of the trial court, the Disciplinary Board of The Pennsylvania Supreme Court reviewed the entire transcript of the notes of testimony at trial and dismissed the disciplinary complaint then pending against appellant Epstein. Thereafter, as appellee and its counsel know, following the decision of the Pennsylvania Supreme Court herein, and based solely upon that decision the Disciplinary Board has reopened the matter and advised Mr. Epstein that "The Supreme Court has concluded that [his] conduct constitutes a violation of the Disciplinary Rules of the Code of Professional Responsibility." The Board further advised appellant that unless he is able to suggest reasons to the contrary discipline by the Board may be recommended.

B. Appellee states that appellants "had commenced a large scale campaign to induce existing clients of [appellee] to terminate Adler Barish [appellee] and to hire [appellants] instead." (p. 4) To the contrary, as appellee knows, of the approximately 1,900 open cases being handled at appellee's office, appellants were handling approximately

1. References "p. " are to pages of the Motion of Appellee to Dismiss or Affirm; Reference "P. " are to pages of Appellants' Jurisdictional Statement. References "A- " are to pages in the Appendix to Appellants' Jurisdictional Statement. References "N.T. " are to pages in the transcript of the notes of testimony at trial in the Court of Common Pleas, Philadelphia County, Pennsylvania.

350 at the time they left appellee's employ. (N.T. 4.62-4.63) Appellants actually contacted only approximately 30 clients and there is no evidence that they ever considered, let alone intended, to contact even 100 of those clients for whose cases they were responsible. Moreover, as appellee also knows, several of those clients who appellants planned to contact actually came to be represented at appellee's firm because of a personal relationship with, or referral to, one of the appellants.

C. Appellee states that "appellant did not merely inform clients about their options, but rather suggested the course those clients should follow." (p. 9) There is neither a finding of fact nor evidence of record to support this statement.

D. Appellee's statement at the top of page 10 that appellants did not challenge "these findings of fact" is totally misleading since it follows one and one-half paragraphs of discussion which refers to two "facts" which were totally irrelevant to the issues in the case and other matters which were *not* findings of fact. Moreover, appellants did challenge these two "facts" on appeal to the Superior Court and found it unnecessary to challenge any relevant "findings of fact" by the trial court before the Pennsylvania Supreme Court.

E. Appellee states that "Like *Ohralik*, this case deals with . . . the same dangers (and proven instances) of overreaching and misrepresentation. . . ." (p. 11) There is no finding of fact, nor evidence of record, to support such a statement. To the contrary, the uncontroverted evidence establishes that of approximately 30 persons contacted by appellants, only approximately 15 decided to select appellants as their counsel and no one testified to any misrepresentation or exercise of any pressure, or even a suggestion by appellants to a client that he or she select appellants. On the other hand, it is clear that appellee

engaged in a pattern of sending letters to all clients on whose cases appellants had worked, *falsely* stating to those clients that appellee had reviewed the files and suggesting that upon such "review" there was evidence that appellants might have failed to do something necessary in the case. (e.g. Trial Exhibits, D-5, 7a, 11; N.T. 5.48-5.51)

II. The Appeal Draws Into Question the Validity of DR 2-103(A).

Appellee rightly acknowledges that this Court's appellate jurisdiction is appropriate whenever there is an occasion that a state statute (or Disciplinary Rule of statewide application), on its face or as applied, is repugnant to federal law. (p. 6-7) Questions I and III presented in appellants' Jurisdictional Statement urge this Court to hold that Pennsylvania Disciplinary Rule DR 2-103(A), as applied to appellants, is repugnant to the United States Constitution.

A. It is uncontroverted that the decision of the Pennsylvania Supreme Court is founded upon a holding that a state may constitutionally impose sanctions upon attorneys who violate disciplinary rules and that appellants' conduct violated DR 2-103(A). *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); (A-41-47, 54). Indeed, the court did not and could not consider whether appellants' conduct constituted tortious interference with contract under state law unless and until it had so held. (A-44, 47, 54). Moreover, the court would not have found appellants' conduct "improper" (A. 51, 54) had it held that their conduct was either constitutionally protected or beyond the reach of DR 2-103(A), (See A-20, at n. 7 and accompanying text, Opinion by Hoffman, J., Superior Court of Pennsylvania). Therefore DR 2-103(A) is necessarily a "statute" whose validity is questioned as repugnant to the Constitution, because it is the *sine qua non* of the court's decision. 28 U.S.C. §1257(2); *Lathrop v. Donahue*, 367 U.S. 820 (1961); c.f. *Ohralik*, supra.

Finally, it is appellants' contention that DR 2-103(A) is repugnant to the Constitution of the United States since it prohibits lawyers in Pennsylvania from truthfully advising clients whose cases they have been personally handling of their right to counsel of their choice, and from providing to them truthful written material which they

can examine in the privacy of their own homes, churches, bar associations, offices, union halls, etc., out of the presence of such lawyers, and use, if they so decide, to make such a selection. There can be no doubt that this issue was presented to the Pennsylvania courts at every level of the proceedings below and thus appellants properly invoke the appellate jurisdiction of this Honorable Court. 28 U.S.C. §1257(2). [See Conclusions of Law 4 and 14 at A-9; Opinion of Superior Court at A-70]

B. Question III of Appellants' Jurisdictional Statement likewise properly invokes this Court's appellate jurisdiction. Its premise is that assuming arguendo that a disciplinary rule could be written to prohibit appellants' conduct consistent with the requirements of the United States Constitution, DR 2-103(A) as written fails to provide adequate limits upon the exercise of discretion by those who apply it, *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 694 (1959) and "to give [appellants] fair notice that their . . . conduct is forbidden. . . .", *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, appellants argue, DR 2-103(A) as applied is repugnant to the First and Fourteenth Amendments to the United States Constitution. Appellants thereby properly invoke this court's appellate jurisdiction.

C. The jurisdictional basis urged by appellants is on all fours with those sustained by this court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *Friedman v. Rogers*, ---- U.S. ---, 59 L.Ed. 2d 100 (1979).

III. Conclusion.

Time and again this court has ruled that the First and Fourteenth Amendments to the Constitution protect conduct and that no matter of epithet applied to protected conduct nor vilification of the actor will serve to deprive it of its constitutional protection. Appellants' communications to clients were truthful. That they were set forth in writing and sent to the clients' homes for review before any action was taken by the client provided ample opportunity for deliberation and consultation with others and, if necessary, to overcome any conceivable pressure (though there is no evidence of any) that might have been exerted in the in person communication.

The importance of providing information to clients of their right to choose who will represent them when "their lawyer" leaves the firm with which he was practicing and how to exercise that choice, is manifest. C.f. *Bates*, 433 U.S. at 364. It is, therefore, most important that this Court make clear that states may not, by conjuring up imagined or speculative possibilities of less than perfect communications between lawyers and clients, effectively deprive the clients of access to such important information thus leaving them at the mercy of the people least likely to provide such information.

For these reasons, and the reasons set forth in Appellants' Jurisdictional Statement, this Honorable Court should deny appellee's motion, set this matter down for plenary hearing and decision and thereafter reverse the final judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 1979, three (3) true and correct copies of Appellants' Reply to Appellee's Motion to Dismiss or Affirm were personally served on Patrick T. Ryan, Esquire, as counsel for Appellee, at his office at 1100 PNB Building, Philadelphia, Pennsylvania 19107. I further certify that all parties required to be served have been served.

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